

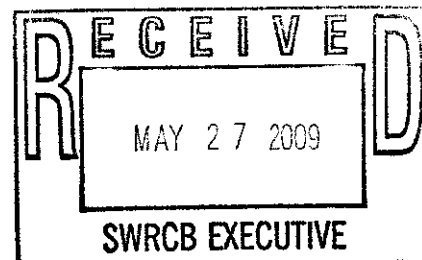
SOUTH COAST



WATER DISTRICT

May 27, 2009

Ms. Jeanine Townsend
Clerk to the Board
State Water Quality Control Board
Office of Enforcement
1001 I Street
Sacramento, CA 95814



Re: Water Quality Enforcement Policy Workshop 6/4/09

Dear Ms. Townsend:

Pursuant to your Notice of Board Workshop to Receive Comments Regarding Draft Water Quality Enforcement Policy, on behalf of South Coast Water District ("SCWD") we hereby submit the following comments.

SCWD is a retail water agency organized and existing as a County Water District under California Water Code Section 30000 *et seq.* SCWD serves approximately 12,500 water accounts with an estimated winter population of 40,000¹ in the South Laguna and Dana Point areas.

SCWD imports approximately 7,500 acre-feet (6.7 million gallons per day ("gpd")) of potable water annually. SCWD maintains approximately 32 million gallons of water storage in 14 area reservoirs (an approximately 4.8-day water supply). The SCWD service area has been identified by the Bureau of Reclamation as an area of "Potential Water Supply Crisis" by 2025.² SCWD's wholesale water providers, the Municipal Water District of Orange County ("MWDOC") and the Metropolitan Water District ("MWD"), have encouraged the development of alternative local water supply sources within the area served by SCWD.³

With the support of MWD, SCWD spent \$5.8 million to construct the subject groundwater recovery facility ("GRF") which produces approximately 10% of SCWD's potable water. To support local water development, MWD subsidizes \$250 per acre-foot of water produced, approximately \$5 million in subsidies over 20 years.

The GRF treats low quality groundwater removed from the San Juan Creek Groundwater Basin (the "Basin") to produce drinking water that is distributed to SCWD customers. The GRF water treatment process primarily consists of reverse osmosis (RO) treatment and iron/manganese removal.

¹ Summer populations in the area vary dramatically due to the presence of beach resorts.

² Bureau of Reclamation "Water 2025 Report".

³ MWD Integrated Resources Water Management Plan.

The GRF was designed in 2001-2002 when the NPDES permit for the facility allowed for sampling at the San Juan Creek Ocean Outfall (the "outfall"). However, in 2006, the Regional Water Quality Control Board, San Diego Region (the "Regional Board"), amended the permit requiring sampling at the GRF to meet the Ocean Plan standards.

SCWD began operating the GRF in June 2007. Between June 2007 and March 2008, the plant operated sporadically and often shut down for extended periods as adjustments were made during this start-up period. SCWD quickly discovered exceedances of the permit limits but could not immediately determine whether they were caused by the sampling procedures or the operation of the plant which was in a start up operational period.

In June 2008, SCWD via South Orange County Wastewater Authority ("SOCWA"), was issued an Administrative Civil Liability ("ACL") Complaint imposing mandatory minimum penalties ("MMPs") which alleged that SCWD exceeded SOCWA's NPDES permit (Order Number R9-2006-0054) for total suspended solids ("TSS"), settleable solids ("SS"), and turbidity with respect to its brine discharge to the outfall. This ACL was subsequently reissued in February 2009 to include all violations through the implementation of the remedy in November 2008. The remedy involved redirection of the brine effluent to the sewer. SCWD recognizes that this is not a long term solution because the brine affects the wastewater treatment plant's ability to recycle water. In the ACL, Regional Board staff assessed 68 violations totaling \$204,000. In many instances, one sample resulted in three violations for instantaneous maximum, average weekly, and average monthly.

SCWD appealed the ACL to the Regional Board arguing in part that (1) MMPs were meant to apply to POTWs and industrial dischargers, not groundwater recovery facilities or water recycling facilities; (2) in light of the State Board's Recycled Water Policy and the Governor's declaration of a statewide drought, entities developing local groundwater should be supported as opposed to arbitrarily penalized for low quality groundwater; (3) groundwater recovery facilities should have a start-up period which would exempt them from violations; (4) SCWD should have been allowed to enter into a time schedule order. A hearing before the Regional Board was held on the matter on May 13, 2009 and the Regional Board appeared to struggle with our plight and expressed frustration at the MMP statute. The Regional Board recognized that assessment of MMPs against a groundwater recovery facility seems counter to the policies in favor of developing local water sources. The matter is currently pending as more briefing has been requested by the Regional Board.

We believe that the Water Quality Enforcement Policy (the "Enforcement Policy") currently being drafted by the State Water Resources Control Board ("State Board") provides an opportunity for the State Board to address this conundrum that the Regional Boards are facing with respect to the application of MMPs to facilities such as the GRF.

MMPs Should Not Apply to Groundwater Recovery Facilities or Other Facilities Developing Local Sources of Water

On June 4, 2008, Governor Schwarzenegger proclaimed a condition of statewide drought and ordered that certain actions be taken to address the serious drought conditions and water delivery limitations. Executive Order S-06-08.

Echoing the Governors sentiments, the State Board also declared:

"California is facing an unprecedented water crisis.

The collapse of the Bay-Delta ecosystem, climate change, and continuing population growth have combined with a severe drought on the Colorado River and failing levees in the Delta to create a new reality that challenges California's ability to provide the clean water needed for a healthy environment, a healthy population and a healthy economy, both now and in the future."

Recycled Water Policy, Adopted February 3, 2009 by the State Board.

The State Board further declared that it "will achieve [its] mission to 'preserve, enhance and restore the quality of California's water resources to the benefit of present and future generations,'" and it "strongly encourage[s] local and regional water agencies to move toward clean, abundant, local water for California by emphasizing appropriate water recycling, water conservation, and maintenance of supply infrastructure and the use of stormwater (including dry-weather urban runoff)" *Id.*

Section 13385 provides that any person who violates any waste discharge requirement "shall be liable civilly in accordance with this section." Water Code § 13385(a). Furthermore,

"In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

Water Code § 13385(e). However, subsection (h) states that

"Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation."⁴

Water Code § 13385(h). The exceptions to the mandatory minimum penalties are as follows:

⁴ A "serious violation" means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 20 percent or more or for a Group I pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 40 percent or more. Water Code § 13385(h)(2).

- (1) A violation caused by one or any combination of the following:
- (A) An act of war.
 - (B) An unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
 - (C) An intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
 - (D) The operation of a new or reconstructed wastewater treatment unit during a defined period of adjusting or testing, not to exceed 90 days for a wastewater treatment unit that relies on a biological treatment process and not to exceed 30 days for any other wastewater treatment unit
- (2) A violation of an effluent limitation where the waste discharge is in compliance with either a cease and desist order or a time schedule order (if all requirements are met).

See Water Code § 13385(j).

The Regional Board prosecution staff has taken the position that it has absolutely no discretion but to assess MMPs against SCWD because the GRF exceeded the NPDES discharge limits. SCWD, however, believes that the Regional Board can choose not to impose MMPs because the intent of the MMP statute was to streamline punishment of POTWs and industrial discharges for violating effluent limits. While there are specific references to POTWs and industrial discharges in the statute, there is no mention of groundwater recovery facilities. In our view, the Legislature simply did not contemplate that the MMPs would apply to groundwater recovery facilities. For example, the start-up period exemption refers exclusively to wastewater treatment units. There is no reason why the start-up period exemption should not apply also to groundwater recovery facilities. In developing the MMPs, the Legislature was clearly focused on POTWs.

The GRF, however, is distinguishable from POTWs and industrial discharges because it does not treat wastewater, nor do its processes add any contaminants; rather, the GRF simply extracts local groundwater and filters and treats the water for potable use. The brine effluent is simply a concentrated form of the natural constituents in the groundwater. Taken together with the state policy in support of the development of local groundwater, the imposition of MMPs where the brine effluent is discharged to the ocean (where in our case the groundwater would have arguably flowed to in any event) is oppressive, over-burdensome, and unreasonable.

SCWD believes that the State Board should exclude groundwater recovery facilities and other facilities that develop local sources of water (such as desalination facilities) from MMPs, or at least explicitly allow the regional boards to exercise discretion not to apply MMPs in these cases. Note that excluding these facilities from MMPs would not preclude the regional boards from assessing other statutory penalties.

If the regional boards continue to blindly apply MMPs to these types of facilities, there undoubtedly will be a chilling effect on the development of local groundwater sources particularly in

low quality basins. For example, SCWD had planned to double its plant capacity by drilling a second well; however, in light of the current ACL, the pending \$204,000 fine, and the fact that its current diversion of the brine to the sewer may compromise the wastewater plant's recycled water program, SCWD is weighing its options. In addition, SCWD has partnered with other local water agencies and Municipal Water District of Orange County to examine the feasibility of a desalination facility in Dana Point. The Regional Board's application of MMPs to this facility particularly during the start-up phase would certainly pose some serious problems.

As the water shortage problem in the state worsens, the State Board must do everything it can to support the development of local water sources. We urge the State Board to clarify its MMP policy as it relates to groundwater recovery facilities and other facilities that develop local sources of water.

If MMPs Must Apply, the State Board Should Adopt Policy to Allow GRFs and Other Facilities that Develop Local Sources of Water to be Immune from MMPs During the Start-up Phase and Allow Them to Implement Compliance Projects

As discussed above, it is clear that the Legislature did not contemplate application of MMPs to groundwater recovery facilities and other facilities that develop local sources of water. As such, no mention of such facilities are included in the start-up period exemption detailed in Water Code § 13385(j)(1)(D). SCWD asserts that the exemption should nevertheless apply to the GRF and other similar facilities, particularly since unlike POTWs where the technology for treating wastewater is well established, groundwater recovery facilities require unique design features based on the constituents in the groundwater. As such, SCWD proposes that the State Board adopt policy directing the Regional Boards to incorporate start-up period adjustments in the NPDES permits for groundwater recovery facilities and other facilities that develop local sources of water.

In addition, in lieu of assessing all or a portion of the MMPs against a GRF or other similar facility, the State Board should consider allowing the facility to spend an equivalent amount towards the completion of a compliance project as discussed in Section VIII, page 32 of the draft Enforcement Policy. Water Code Section 13385(k) currently allows POTWs "serving a small community" to exercise this option. We believe this option should be expanded to GRFs and other facilities that develop local sources of water in light of the benefit the public receives from these facilities (i.e., development of potable water).

The State Board Should Adopt Policy to Expedite the Process for Issuing Time Schedule Orders and Allow for Retroactive Application

In September 2008, we met with Regional Board staff and indicated that SCWD was interested in entering into a time schedule order to allow SCWD some time to implement a remedy. We were told by staff that it would take over 5 months to get a time schedule order in place. At the time, SCWD estimated that the remedy would be implemented within 6-8 weeks. We asked if we could still go through the time schedule order process and have the order be retroactive such that SCWD would not be liable for violations during the implementation phase. We were told that time schedule orders cannot be retroactive.

First of all, the circumstance surrounding the GRF is exactly the type of situation time schedule orders were intended to cover:

"It is the intent of the State Water Board that compliance schedules for NDPES permits only be granted when the discharger must implement actions to comply with a more stringent permit limitation, such as designing and constructing facilities or implementing new or significantly expanded programs and securing financing, if necessary, to comply with permit limitations implementing new, revised, or newly interpreted water quality objectives or criteria in water quality standards, and that any schedules be granted for the minimum amount of time necessary to achieve compliance."

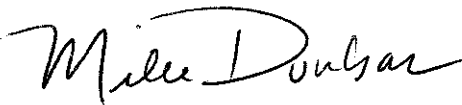
State Water Resources Control Board Resolution No. 2008-0025, Policy for Compliance Schedules in National Pollutant Discharge Elimination System Permits. The GRF received a more stringent permit limitation by virtue of having to meet the Ocean Plan effluent limitations at the facility as opposed to the outfall.

Moreover, in our view neither the statute nor the policy concerning time schedule orders prohibits the compliance schedule to be retroactive. SCWD should have been able to "stop the clock" on their violations by entering into a time schedule order, but instead, it was penalized by the Regional Board's lengthy administrative process. We believe that the State Board should adopt policy to shorten this time schedule order process and also allow for retroactive application of the time schedule orders.

We appreciate this opportunity to comment on the draft Enforcement Policy and should you have any questions, please do not hesitate to contact us.

Sincerely,

SOUTH COAST WATER DISTRICT



Michael P. Dunbar
General Manager *by BEB*

cc: Tom Rosales, General Manager of South Orange County Wastewater Authority
Betty Burnett, Esq.
Patricia Chen, Esq.